Chin Cheen Foh v Ong Tee Chew

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–23–7 OF 2002
ABDUL MALIK ISHAK J
17 APRIL 2003

Companies and Corporations *— Winding up — Liquidators — Defendant was court appointed liquidator — Suit against defendant — Whether leave of winding up court required before plaintiff allowed to proceed with suit against defendant*

The plaintiff was a shareholder and a former director of a company known as CTI Leather Sdn Bhd ('CTI'). The defendant was a court appointed provisional liquidator of CTI pursuant to an order of the Kuala Lumpur High Court ('the winding up court'). Pursuant to the said appointment, the defendant had, in his capacity as the court appointed provisional liquidator, submitted a preliminary report pursuant to s 235(1) of the Companies Act 1965 ('the Act') to the winding up court. It was said that the preliminary report contained words and statements which the plaintiff alleged were untrue and incorrect and amounted to defamation of the plaintiff by the defendant. Consequently, the plaintiff brought an action against the defendant for defamation. The defendant applied to strike out the plaintiff's statement of claim under O 18 r 19(1)(a) of the Rules of the High Court 1980 ('RHC') on the ground that it disclosed no reasonable cause of action. Before the senior assistant registrar ('SAR'), the defendant raised a preliminary objection that leave of the winding up court was required before the plaintiff was allowed to proceed with the present suit against the defendant. The SAR ruled that the preliminary objection should be decided in favor of the defendant and struck out the statement of claim. This was the plaintiff's appeal to the judge in chambers against the dismissal of his suit by SAR.

Held, dismissing the appeal:

(1) Here, the civil suit which the plaintiff filed was not against CTI but against the defendant, who was CTI's court appointed provisional liquidator. Once appointed, the provisional liquidator must act within the confines of the law. Since the sole aim of the appointment was to preserve the assets of the company, the provisional liquidator was obliged under s 233(1) of the Act to take all the company's properties into and under his custody. The defendant, a court appointed provisional liquidator had all the trappings and the powers of a liquidator, which are set out under s 236 of the Act (see p 62C, H–I).

(2) Before bringing an action against the defendant who was an officer of the court by virtue of his position as a court appointed provisional liquidator, the plaintiff should first obtain leave of the winding up court. Here, leave was not obtained by the plaintiff

before he proceeded to file the present civil suit against the defendant in the defendant's personal capacity. This was certainly wrong in procedure and this court would not condone such laxity (see p 66A–B). A

(3) Accordingly, the statement of claim was rightly struck out by the SAR. However, since limitation had not set in, the plaintiff could still refile the same civil suit by first obtaining leave from the winding up court (see p 66C). B

[Bahasa Malaysia summary

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Plaintif adalah seorang pemegang saham dan bekas pengarah sebuah syarikat dikenali sebagai CTI Leather Sdn Bhd ('CTI'). Defendan adalah seorang penyelesai sementara CTI yang dilantik oleh mahkamah menurut satu perintah Mahkamah Tinggi Kuala Lumpur ('mahkamah penggulungan'). Menurut perlantikan tersebut, defendan telah, dalam kapasiti beliau sebagai seorang penyelesai sementara yang dilantik oleh mahkamah, mengemukakan satu laporan awal menurut s 235(1) Akta Syarikat 1965 ('Akta tersebut') kepada mahkamah penggulungan tersebut. Ia telah dinyatakan bahawa laporan awal tersebut mengandungi perkataan-perkataan dan pernyataan-pernyataan yang plaintiff katakan tidak benar dan tidak betul dan membentuk fitnah terhadap plaintif oleh defendan. Berikutan itu, plaintif telah memulakan satu tindakan terhadap defendan kerana fitnah. Defendan telah memohon untuk membatalkan pernyatan tuntutan plaintif di bawah A 18 k 19(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atas alasan bahawa ia tidak menunjukkan apa-apa kausa tindakan yang munasabah. Di hadapan penolong kanan pendaftar ('PKP'), defendan telah menimbulkan satu bantahan awal bahawa kebenaran mahkamah penggulungan dikehendaki sebelum plaintif dibenarkan untuk memulakan guaman semasa terhadap defendan. PKP telah memutuskan bahawa bantahan awal tersebut sepatutnya diputuskan bagi pihak defendan dan membatalkan pernyataan tuntutan tersebut. Ini adalah rayuan plaintif kepada hakim dalam kamar terhadap penolakan guaman beliau oleh PKP.

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Diputuskan, menolak rayuan tersebut:

(1) Di sini, guaman sivil yang telah difailkan oleh plaintif bukan terhadap CTI tetapi terhadap defendan, yang merupakan penyelesai sementara CTI yang dilantik oleh mahkamah. Setelah dilantik, penyelesai sementara tersebut harus bertindak mengikut batasan undang-undang. Memandangkan satu-satunya tujuan perlantikan tersebut adalah untuk mengawal aset-aset syarikat tersebut, penyelesai sementara tersebut mempunyai tanggungjawab di bawah s 233(1) Akta tersebut untuk mengambil semua hartanah syarikat tersebut di bawah kawalan. Defendan,

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seorang penyelesai sementara yang dilantik oleh mahkamah mempunyai segala kuasa seorang penyelesai, yang dinyatakan di bawah s 236 Akta tersebut (lihat ms 62C, H–I).

(2) Sebelum memulakan satu tindakan terhadap defendan yang merupakan seorang pegawai mahkamah menurut jawatan beliau sebagai seorang penyelesai sementara yang dilantik oleh mahkamah, plaintif sepatutnya mendapatkan kebenaran mahkamah penggulungan. Di sini, kebenaran tidak diperolehi oleh plaintif sebelum beliau mula untuk memfailkan guaman sivil semasa terhadap defendan dalam kapasiti peribadi defendan. Ini sememangnya salah dari segi prosedur dan mahkamah ini tidak akan membiarkan kecuaian sebegini berlaku (lihat ms 66A–B).

(3) Sewajarnya, pernyataan tuntutan telah dibatalkan dengan betul oleh PKP. Namun begitu, memandangkan had masa belum luput, plaintif masih boleh memfail semula guaman sivil yang sama dengan terlebih dahulu mendapatkan kebenaran daripada mahkamah penggulungan (lihat ms 66C).]

Notes

For cases on liquidators, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 917–945.

Cases referred to

Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow [1995] 3 MLJ 204 (refd)

Club Mediterranean Pty Ltd, Re [1975] 11 SASR 481 (refd)

Highfield Commodities Ltd, Re [1984] 3 All ER 884 (refd)

Maidstone Palace of Varieties Limited, Re; Blair v Maidstone Palace of Varieties, Limited [1909] 2 Ch 283 (refd)

PT Anekapangan Dwitama v Far East Food Industries Sdn Bhd [1995] 1 MLJ 21 (refd)

TN Metal Industries Sdn Bhd & Ors v Ng Pyak Yeow [1996] 4 MLJ 567 (refd)

Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd [1992] 2 MLJ 233 (refd)

Legislation referred to

Companies Act 1965 ss 226(3), 231, 233(1), 235(1), 236(3), 305

Companies (Winding Up) Rules 1972 r 35

Rules of the High Court 1980 O 18 r 19, (1)(a), (2), O 92 r 4

Francis Goh Yun Hung (*Francis Goh & Co*) for the plaintiff

Shireen Selvaratnam (*Azman Davidson & Co*) for the defendant.

Abdul Malik Ishak J:

Introduction

This was an appeal to the judge in chambers, as seen in encl 11, filed by the plaintiff against the dismissal of his suit with costs that was handed down by the learned senior assistant registrar ('SAR'). Enclosure 11 was an upshot of the defendant's summons in chambers application in encl 6 wherein the defendant sought to strike out the plaintiff's statement of claim in encl 1 under O 18 r 19(1)(a) of the Rules of the High Court 1980 ('RHC') in that it disclosed no reasonable cause of action. The defendant too craved in aid of his application in encl 6, the inherent jurisdiction of this court to strike out the statement of claim in encl 1. Incidentally, under O 18 r 19(2) of the RHC no evidence shall be admissible on an application under para (1)(a) thereto.

By way of an obiter dictum, the 'inherent powers' of the court as preserved under O 92 r 4 of the RHC is an extension of the phrase 'inherent jurisdiction' of the court and is often resorted to by legal practitioners in their quest for justice. Another popular phraseology is 'inherent authority'. These phrases are attractive and they connote this: the powers possessed by a court simply because it is a court. It is an authority that inheres in the very nature of a judicial body and it requires no grant of power other than that it creates the court and gives it the necessary jurisdiction. The exercise of the inherent powers of the court rests entirely in the discretion to be exercised by the judge. So the judge is given a wide procedural leeway to conduct its civil business in order to achieve a sound and efficient administration of justice in accordance with the RHC. English courts are very advanced. The development of the English common law and chancery practice are now too well known. They are documented in many textbooks. English courts assumed the inherent authority to prevent abuses of their processes and procedures and they control the conduct of persons appearing before them. Suffice for me to say that the scope of the court's inherent jurisdiction should be viewed in a pragmatic way. It is very wide and all encompassing. Of pertinence to note is this: what is necessary or essential in order to manage a complex litigation today is different from what had been considered necessary in simpler cases a generation ago. Times are moving ahead. The courts' control over cases often take many forms. It can dismiss an action for failure to prosecute expeditiously. It can dismiss an action on grounds of frivolousness or vexatiousness. It can assert control over various kinds of disruptive conduct through contempt proceedings where detention and fines could be imposed. These are sanctions which are deemed to be attributes of judicial power and thus requiring no specific authorization. It is recognized that the court has the inherent authority to prescribe general rules of practice and procedure in order to govern the conduct of cases over which it has jurisdiction. In modern times, the Chief Judge of Malaya would issue practice directions which would prescribe a multitude of practices that must be observed by the parties and their legal practitioners.

The short of it all would be this. That the inherent powers of the court consist of all those powers reasonably required to enable a court to perform

efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective and effectual. These powers are indeed inherent; inherent in the sense that they exist because the court exists.

I shall now revert to the mainstream of the case.

Before the learned SAR, the defendant raised a very interesting point of law by way of a preliminary objection. It was this. Whether leave of the winding up court vide Commercial Court No D5–28–57–2000 was required before the plaintiff was allowed to proceed with the present suit against the defendant who is a court appointed provisional liquidator?

This judgment is focused entirely on that preliminary objection.

The learned SAR ruled that the preliminary objection should be decided in favor of the defendant and, consequently, struck out the statement of claim in encl 1 forthwith. Before me, Mr Francis Goh, the learned counsel for the plaintiff, submitted that there was no necessity for the plaintiff to obtain leave of the winding up court before the plaintiff proceeds against the defendant — who is a court appointed provisional liquidator. Miss Shireen Selvaratnam, the learned counsel for the defendant, argued that leave was an essential prerequisite and she urged this court to dismiss the appeal in encl 11 with an order that costs be paid by the plaintiff to the defendant forthwith.

Facts of the case

It would be useful to set out the facts of the case and I will accordingly proceed to do so.

The plaintiff is a shareholder and a former director of a company known as CTI Leather Sdn Bhd ('CTI'). The defendant, on the other hand, is a court appointed provisional liquidator of CTI pursuant to an order of the Kuala Lumpur High Court dated 11 July 2001 vide Companies (Winding Up) Petition No D5–28–57–2000 ('the said action'). Now, pursuant to the said appointment, the defendant had on 12 September 2001 in his capacity as the court appointed provisional liquidator submitted a preliminary report pursuant to s 235(1) of the Companies Act 1965 ('the Act') to the winding up court in the said action. In addition to that, the defendant also forwarded the same preliminary report to the solicitors of both the petitioner and the respondent in the said action. It was said that the preliminary report contained words and statements which the plaintiff alleged were untrue and incorrect and amounted to defamation of the plaintiff by the defendant. The particulars of those words and statements are clearly set out in the statement of claim and I do not propose to set them out in this judgment. Moreover, whether those words and statements are in fact defamatory would be ventilated at a different forum and on another occasion.

It must be stated that the defendant entered a conditional appearance to the said Action and thereafter the defendant applied to strike out the plaintiff's statement of claim.

To the heart of the matter

The preliminary objection was concerned about the plaintiff filing the present proceedings against the defendant — a court appointed provisional liquidator, without the leave of the winding up court. There are no provisions in the Act governing the question as phrased and framed in the preliminary objection. There is, however, s 226(3) of the Act which enacts that when a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except:

(a) by leave of the court; and

(b) in accordance with such terms as the court imposes.

Here, the civil suit which the plaintiff filed was not against the company known as CTI that has been wound up but rather it was against the defendant — an individual, who happens to be the court appointed provisional liquidator of CTI. Section 231 of the Act governs the appointment of a court appointed provisional liquidator and that section is worded as follows:

Provisional liquidator

> The Court may appoint the Official Receiver or an approved liquidator provisionally at any time after the presentation of a winding up petition and before the making of a winding up order and the provisional liquidator shall have and may exercise all the functions and powers of a liquidator subject to such limitations and restrictions as may be prescribed by the rules or as the Court may specify in the order appointing him.

It is the court who may appoint a provisional liquidator on an application of any creditor or contributory. This is clearly set out in r 35 of the Companies (Winding Up) Rules 1972. Parties who are interested in the welfare of the company are also entitled to apply for the appointment of a provisional liquidator. Even directors of a company fearing that the assets will dissipate, may also apply to have a provisional liquidator appointed (*Re Highfield Commodities Ltd* [1984] 3 All ER 884).

It is entirely at the court's discretion whether a provisional liquidator ought to be appointed. If the court feels that it is in the interests of the company that a provisional liquidator should be appointed then the court will appoint accordingly (*PT Anekapangan Dwitama v Far East Food Industries Sdn Bhd* [1995] 1 MLJ 21 at p 24; and *Re Club Mediterranean Pty Ltd* (1975) 11 SASR 481 at p 484). Once appointed, the provisional liquidator must act within the confines of the law. Since the sole aim of the appointment is to preserve the assets of the company, the provisional liquidator is obliged under s 233(1) of the Act to take all the company's properties into and under his custody. In other words, the court appointed provisional liquidator, just like the defendant here, has all the trappings and the powers of a liquidator. And these powers are amply set out in s 236 of the Act.

Within a narrow compass, that would be a brief discourse in regard to a court appointed provisional liquidator. Reverting back to the preliminary objection, I need to refer to some authorities that may assist me in answering the question posed in the preliminary objection. But first I have this to say. As a court appointed provisional liquidator, the defendant is an officer of the court and the court will jealously protect him and this is clearly demonstrated in the case of *Re Maidstone Palace of Varieties Limited; Blair v Maidstone Palace of Varieties, Limited* [1909] 2 Ch 283. In a short judgment, Neville J, had this to say at p 286 of the report:

> In this case the applicant is a receiver appointed by this court in a debenture-holders' action, and by virtue of that appointment he has had the management of the theatre known as the *Maidstone Palace of Varieties*. In the course of that management he made use of certain plant which is claimed by the respondent company as their property. They say that he had no right to use it except on the terms of paying them a rent, and they claim a considerable sum. It appears to me that a dispute of that kind is one which, as is shewn by *Aston v Heron* [2 My & K 390], the court will deal with itself, and that it will not allow its officer to be subject to an action in another court with reference to his conduct in the discharge of the duties of his office, whether right or wrong. The proper remedy for any one aggrieved by his conduct is to apply to this court in the action in which he was appointed. If any wrong has been done by the officer, the court will no doubt see that justice is done, but no one has a right to sue such an officer in another court without the sanction of this court. The present application is accordingly right in form. The respondents must therefore bring in their claim in the debenture-holders' action within 14 days, and must be restrained from commencing any other proceedings against the receiver.

Interestingly, this very judgment of Neville J found favor of the then Supreme Court in the case of *Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd* [1992] 2 MLJ 233. Gunn Chit Tuan SCJ speaking for the then Supreme Court (with a coram of Abdul Hamid Omar LP, Gunn Chit Tuan SCJ, Anuar Zainal Abidin J) aptly said at p 241 of the report, which must surely apply to the present case at hand:

> But the important point in this case was that as the appellants are officers of the court, leave of the court should have been obtained to proceed against them in the second originating summons and the case of *Re Maidstone Palace of Varieties, Ltd.* [1909] 2 Ch 283] was correctly cited by counsel for the appellants in support of his submission that leave of the court was necessary. Unfortunately the preliminary objection of counsel in the lower court was overruled by the learned judge for if his Lordship had upheld that preliminary objection, then the further prosecution of the second originating summons should have been restrained and dismissed with costs if leave was not obtained.

Perhaps, on all fours with the present case at hand would be the case decided by the Court of Appeal in the case of *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204. There Abu Mansor JCA had to deal with a similar issue. That was a case where the applicant had rented certain premises to Rich's Supercentre Sdn Bhd ('the company'). And upon the winding up of the company, the applicant applied by way of an originating

motion for the arrears of rent from the liquidator. The trial judge found that the originating motion was filed after the winding up order was made by the court. Since by virtue of s 226(3) of the Act, leave of the court was required before commencing the action and that as no leave had been obtained, the trial judge struck out the action. The applicant then appealed on the issue of whether leave of court was indeed necessary before commencing the action since the motion was against the liquidator personally. In dismissing the appeal, Abu Mansor JCA held that according to s 236(3) of the Act, a liquidator appointed by the court is considered as an officer of the court and leave of court is needed before an action can be commenced against him. His Lordship also held that the application should have been made under s 305 of the Act because a claim against the liquidator in the course of winding up comes under s 305 and not s 226(3) of the Act. In any event, his Lordship held that the applicant should have first obtained authority from the winding up judge before proceeding against the liquidator. In the main body of the judgment, this was what Abu Mansor JCA had to say (see pp 207–208 of the report):

> At the hearing of this appeal, Mr GT Rajan for the appellant submitted that the only issue for the court to answer was whether leave of court was indeed necessary before commencing this motion since the motion is against the liquidator personally. He submitted further that it is trite law if the motion is against the company, and the company having been wound up at the motion's commencement, he conceded that leave would have to be obtained first but he submitted, however, that since the motion was against the liquidator personally no leave was required. He submitted further that if, however, the court's decision was that leave was necessary, the court was then spared from going into the merit of this application. We adjourned to consider and to give our decision.
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> At our resumed hearing, we struck off this appeal as we agreed with the learned judge that the motion, as such, in the first place, required the leave of the court before it could be brought but not for the reason found by the judge. Firstly, we read the powers of liquidator in s 236(3) of the Companies Act 1965 ('the Act'):
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> > 'The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.'
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> We are of the view from the above provision, it is clear that a liquidator having been appointed by the court, is an officer of the court. It goes without saying leave of the court is needed before an action is commenced against him and officers like him.
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> We would cite the legal position of receivers who are in the same position as officers of court. In *The Law Relating to Receivers, Managers and Administrators* by Hubert Picarda at p 339, the learned author wrote:
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> > 'A receiver, in the words of Viscount Haldane LC, "is an officer of the court put in to discharge certain duties prescribed by the order appointing him". ... He is "nothing more than the hand of the court". ... for the purpose of holding the property of the litigants, ... and the possession of the receiver is simply the possession of the court.'

Then at p 373 of *Law of Receivers* by PS Atchuthen Pillai (2nd Ed) the author wrote in para 27:

> 'Suit without leave is contempt of court and will be dismissed. A suit against a receiver when filed without leave of court is liable to be dismissed ...
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> Institution of proceedings against a receiver without leave of the court is contempt of court. It is incompatible with the dignity and authority of the court to allow its officer to be summoned before any tribunal ...'

As we have stated we were unanimous that the applicant should have obtained leave before making his application below, for the attitude of a winding up court has been that some form of leave is required. In the *Privy Council case of Lloyd-Owen v Bull* (1936) 4 DLR 433, where the liquidator of a company was required by the then company law, on an application of stockholders and contributories, to proceed against officers and stockholders of the company, to recover corporate assets wrongfully acquired by them which they had not accounted for to the corporation, the procedure adopted was by way of petition which prayed for an order that the liquidator be directed in the company's name to take action against the respondent for the recovery of the property and assets alleged to be the property of the company and other relief.

At p 276 of the above judgment, his Lordship Lord Blanesburgh, speaking of the procedure to be adopted in this type of application, said:

> 'A judge in winding up is the custodian of the interests of every class affected by the liquidation. It is his duty even if it be in a voluntary liquidation that opportunity offers to see to it that all assets of the company are brought into the winding up. In authorizing proceedings, especially if they may or will involve some drain upon the assets, he must satisfy himself as to their probable success; where, as in the present case, they involve no possible charge on assets, he will nevertheless be careful to see that any action taken in the company's name under his authority is not vexatious or merely oppressive.'

And his Lordship Abu Mansor JCA rounded up the matter at p 210 of the report in these salient words:

> While we agree that the applicant may proceed against the liquidator, we are, however, firmly of the view the procedure is that the applicant must have first obtained authority from the winding up judge before proceeding against the liquidator and not, as was done here, proceeded independently to prevent unnecessary and wasteful litigation. The approach the learned judge should take is as given in the Privy Council case of *Lloyd-Owen v Bull* cited above. As advised in that case, he has to obtain authority from a judge below who will act liberally but must satisfy himself as to the probable success of this application and he has to give an assurance to the sanctioning judge that his action is not vexatious or merely oppressive. The court, in exercising their supervision, will ensure that no wasteful litigation is brought against liquidators and the like. Since the applicant had not obtained the authority to proceed, we struck off this appeal with no order as to costs.

The same approach was also adopted by the High Court in the case of *TN Metal Industries Sdn Bhd & Ors v Ng Pyak Yeow* [1996] 4 MLJ 567.

In a nutshell, from these authorities it can rightly be said that before bringing an action against the defendant who is an officer of the court by virtue of his position as a court appointed provisional liquidator, the plaintiff should first obtain leave of the winding up court. In the context of the present case, leave was not obtained by the plaintiff before he proceeded to file the present civil suit against the defendant in the defendant's personal capacity. This was certainly wrong in procedure and this court would not condone such laxity.

The upshot of it all was quite apparent. I answered the preliminary objection as framed in the positive. This meant that I must dismiss the appeal in encl 11. In addition to that, I too made an order that costs to be paid forthwith by the plaintiff to the defendant. This also meant that the statement of claim in encl 1 was rightly struck out by the learned SAR and I so affirmed accordingly.

But all is not lost. Since limitation has not set in, the plaintiff could still refile the same civil suit by first obtaining leave from the winding up court. That would entirely rest on the shoulders of the plaintiff.

Appeal dismissed.

Reported by Lim Lee Na